BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KATHLEEN L. BOWMAN Claimant	)	
VS.	)	
WESLEY MEDICAL CENTER LLC Respondent	)	Docket No. 1,039,638
AND	)	
ZURICH AMERICAN INS. CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the May 4, 2009, Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on September 25, 2009. Lawrence M. Gurney, of Wichita, Kansas, appeared for claimant. Douglas C. Hobbs, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant had a 15 percent permanent partial impairment to the body as a whole as a result of her work-related accident on August 29, 2007. The ALJ denied claimant's request for a work disability, finding that claimant was terminated from her employment at respondent for cause. At the oral argument before the Board, the parties also raised an issue concerning payment of past and future medical treatment expenses. The ALJ listed that as an issue in his Award but did not address it. In fact, the ALJ made no findings and made no orders concerning claimant's past medical treatment expenses and future medical.[1]

The Board has considered the record and adopted the stipulations listed in the Award. During oral argument to the Board, the parties agreed that claimant is entitled to

[1] Claimant does not dispute respondent's contention that it has paid medical treatment expenses totaling $5,414.77.

payment of her authorized medical treatment expenses by respondent and future medical upon application to and approval by the Director.

ISSUES

Claimant requests review of the ALJ's finding that claimant is not entitled to a work disability. Claimant contends that termination for just cause is no longer a defense to a work disability claim, citing *Bergstrom.*[2] In the event the Board holds termination for just cause is a valid reason for denying work disability, claimant argues that she is a longstanding employee who, at best, made mistakes because she was busy, the mistakes were not done in bad faith, and her alleged misconduct did not amount to a sufficient cause for termination.

Respondent asserts the record reveals that claimant was terminated for cause and is therefore not entitled to a work disability. Further, although respondent argued in its brief that neither the Kansas Court of Appeals nor the Kansas Supreme Court have abrogated the requirement for a good faith effort in finding or maintaining post-injury employment, respondent conceded at oral argument to the Board that the good faith job search requirement has now been abrogated by the Supreme Court in *Bergstrom*. Nevertheless, respondent argues that *Bergstrom* did not address the question of a termination for cause. Respondent also argues that the Board should modify the Award to find that claimant suffered no more than a 5 percent functional impairment to her body as a whole.

The issues for the Board's review are:

(1) Is termination for just cause a defense to a work disability claim? If so, did respondent have just cause for terminating claimant's employment?

(2) What is the nature and extent of claimant's functional disability and work disability?

FINDINGS OF FACT

Claimant had worked for respondent about 25 years as a registered nurse. On August 29, 2007, she was walking by a patient's room when a physical therapist asked for help because the patient was falling. Claimant helped lift the patient up and then helped him to the commode. As a result, she felt pain in her neck, shoulders, and left arm down into her hand.

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[2] *Bergstrom v. Spears Manufacturing Company*, ___ Kan. ___, 214 P.3d 676 (2009).

Claimant did not miss any time from work. Respondent first sent her to Dr. Mark Dobyns, who treated her with anti-inflammatory medication and restricted her to light duty work. Claimant was eventually referred to Dr. Paul Stein for treatment. She was given two epidural injections, which helped her. Dr. Stein released her from treatment on January 31, 2008, with permanent restrictions. Respondent was able to accommodate those restrictions, and claimant continued to work until the end of February 2008. She was officially terminated by respondent on or about March 6, 2008.

Tracy Jarrell was claimant's supervisor during the time period from January through March 2008. Part of her job included being in charge of patient safety and quality of care on the floors she supervised. As part of the safety policy at respondent, a nurse giving medication pulls the medication from a Pyxis machine. The nurse is to then place the medication on a Stinger cart, which contains a laptop computer and a scanning wand. The nurse would take the cart to the patient's room, scan the medication with the wand and then scan the patient's armband. The computer would then verify that the medication is the correct medication and the correct dose to be given that particular patient. Only then is the nurse to administer the patient the medication. Respondent also had a policy wherein medication was to be given a patient within a 30-minute time frame before or after it was due.

Ms. Jarrell testified that claimant was terminated for falsifying patients' medical records. She explained that an audit performed on February 25, 2008, revealed that on at least six occasions, the times the computer showed claimant's patients received medication before the medication was shown as having been pulled from the Pyxis machine. After receiving this report, Ms. Jarrell observed claimant give patients medication without first scanning the armbands.

Claimant testified that at times, when she was busy, she would pull the medication and administer it to patients within the 30-minute time frame without scanning the patient's armband. She said that she would scan the armband later and then change the time in the computer to show the time the medication was actually given, rather than the time the armband was scanned. She claimed that this was a procedure she had followed for some time. She said she would not use the procedure for time-sensitive medication, such as pain medication. She denied she changed the times in the computer to show that medication was administered timely when, in fact, it was not. She said the medication would have been given timely, but the armband was scanned later. Claimant also testified that she believed the medication and armband were scanned for billing purposes. Ms. Jarrell testified that the scanning procedure was a safety procedure to make sure the right medication, at the correct dosage, was given to the right patient at the time it was due to be given.

When it was determined that claimant was changing times in the computer, she was immediately suspended for three days and was then terminated. Ms. Jarrell testified that respondent's policy was that if an employee was caught falsifying records, the result is

termination. She said she did not know of any way claimant could have filed a grievance internally once she had been terminated. She admitted that claimant's activity could also have been characterized as unsatisfactory work performance or failure to follow departmental or hospital rules. Those violations called for a written warning, and claimant would have been counseled and allowed to correct her behavior. However, falsifying records is a higher level violation, and the disciplinary procedure for that violation is termination. Ms. Jarrell testified that another nurse was also terminated around the same time period for similar conduct. That other nurse did not have a workers compensation claim.

Claimant testified that after she was terminated, she began looking for work. She said she went to about 30 different places in her search. She said the fact that she had been terminated by respondent was a detriment to her finding employment. Also, she said that her lifting restriction limited her ability to do some nursing jobs. On August 12, 2008, she started working as an adjunct professor at Wichita Area Technical College.

It has been stipulated by the parties that claimant's preinjury average weekly wage (AWW), inclusive of fringe benefits, was $1,350.82. From March 7, 2008, until August 11, 2008, claimant was unemployed. From August 12, 2008, until November 30, 2008, claimant earned $530.76[3] per week, inclusive of fringe benefits; from December 1, 2008, until January 1, 2009, claimant earned $730.76 per week, inclusive of fringe benefits; and from January 2, 2009, to present, claimant is earning $955.76 per week, inclusive of fringe benefits.

Dr. Paul Stein, a board certified neurosurgeon, first saw claimant on October 9, 2007. He diagnosed her with mild left-sided nerve root irritation and degenerative disk disease at C5-6, which he believed was aggravated by the work accident in August 2007. He recommended conservative treatment. That treatment included physical therapy and epidural steroid injections. At her December 20, 2007, appointment, claimant told him she had a 75 percent improvement of her symptoms after the injections. She told Dr. Stein she was working and that other than the lifting, she was able to do most of her regular work.

The last time Dr. Stein saw claimant was on January 31, 2008. At that time, claimant had some mild recurrence of discomfort along the left side of her neck. She was not prepared to proceed with another epidural, and Dr. Stein released her from care. He gave her permanent restrictions against lifting more than 25 pounds and against repetitive overhead activity.

Dr. Stein did not find that claimant had radiculopathy. He said that she might have some radicular irritation but no evidence of permanent nerve damage as required by the

[3] Although the parties' Stipulation sets out this figure as $537.76, the parties agreed during oral argument to the Board that the Stipulation contained this typographical error, and the correct figure is $530.76.

AMA *Guides*[4] to put her in the radiculopathy category. He found no atrophy or loss of reflex. No EMG was done, and her strength was intact. Based on his examination, claimant was in DRE cervicothoracic Category II. Therefore, using the AMA *Guides*, Dr. Stein rated claimant as having a 5 percent whole person impairment.

Dr. Stein reviewed a task list prepared by Jerry Hardin. Of the 29 nonduplicative tasks on that list, Dr. Stein opined that claimant would be unable to perform 10, for a 34 percent task loss.

Dr. C. Reiff Brown, a retired board certified orthopedic surgeon, examined claimant on May 12, 2008, at the request of claimant's attorney. Upon examination, he found claimant had atrophy in her neck, shoulders and shoulder girdles. In claimant's case, he said the atrophy was due to nerve damage. He said she also had some limitations in her range of motion and some reflex decreases. He diagnosed her with C5-6 degenerative disc disease that had been aggravated by her work activity. He also found that she had C5-6 radiculopathy.

Dr. Brown rated claimant as having a 15 percent permanent partial impairment to the body as a whole based on DRE cervicothoracic Category III for radiculopathy. He said she has an additional 10 percent impairment of the left upper extremity on the basis of her sensory motor nerve impairment. These values converted and combined to a 20 percent permanent partial impairment to the whole body. Dr. Brown defined radiculopathy as a condition in which pain, numbness and weakness involve a given spinal nerve. In this case, he opined that C6 was involved. He said that claimant had definite atrophy of triceps musculature and skin sensation loss in the middle fingers of the left hand. Dr. Brown said that not all patients with radiculopathy have permanent weakness and loss of sensory function. Because claimant did, he believed she deserved additional impairment.

Dr. Brown reviewed the task sheet prepared by Jerry Hardin. There are 29 unduplicated tasks, of which claimant can no longer perform 10 for a task loss of 34 percent. Dr. Brown did not believe that claimant should continue to work as a nurse taking care of patients. He said she should permanently avoid working in any job that would require her to lift people. He said she could work as a nurse at many tasks, but that a nurse in a hospital setting has overlapping tasks, and if a nurse is around when a patient starts to fall, he or she is required to catch the patient. He said that claimant is able to teach nursing, as she is now doing. She could also be a school nurse, a nurse in a doctor's office, a home health nurse, or a nurse case manager.

Dr. Robert Eyster, a board certified orthopedic surgeon, examined claimant on July 31, 2008, at the request of the ALJ. His examination of claimant showed that she had

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[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

no real loss of motion. The posterior foraminal closure test increased the irritation coming across her shoulder. She had good shoulder motion without impingement signs and no deltoid weakness. She had no atrophy that he could detect. Some numbness was noted in the C5-6 distribution, and claimant had weakness of her left triceps as compared to her right.

Dr. Eyster found claimant to be in DRE cervicothoracic Category III, having a 15 percent permanent partial impairment to the whole body. He said that based on her x-rays, claimant had preexisting degenerative disc disease. He noted that osteophytes were present with mild impingement of the spinal canal at C4-5 and C5-6 before claimant's injury of August 29, 2007. He believed that claimant's preexisting condition contributed about 70 percent of her 15 percent impairment.

Dr. Eyster reviewed the task list prepared by Jerry Hardin and believed that of the 29 unduplicated tasks on the list, claimant was unable to perform 5 for a 17 percent task loss. He gave claimant restrictions of no repetitive lifting and no overhead work. He said she should not lift over 25 pounds. Dr. Eyster testified that there are nursing tasks that claimant would be unable to perform as a result of her injury. But he said that if respondent accommodated claimant on the five tasks that she could not perform as a floor nurse, that would be a reasonable job for her on a long-term basis.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The Board's review of an Award in workers compensation claims is de novo.[5] K.S.A. 2008 Supp. 44-555c(a) states in part:

> The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact

[5] See *Riedmiller v. Harness*, 29 Kan. App. 2d 941, Syl. ¶ 3, 34 P.3d 474 (2001), *rev. denied* 273 Kan. 1037 (2002); *Miner v. M. Bruenger & Co.*, 17 Kan. App. 2d 19, Syl. ¶ 1, 836 P.2d 19 (1992).

> as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

Claimant contends her termination was not in good faith. In *Guerrero*[6], the claimant made a good faith effort to perform an accommodated job that was within her restrictions but which caused her pain. She was terminated but was still eligible to receive a work disability award. In *Niesz,*[7] the court found that where a claimant's termination was not made in good faith because respondent inadequately investigated the facts relating to the termination, there could still be an award of work disability. "Once an accommodated job ends, the presumption of no work disability may be rebutted."[8]

In *Roskilly*,[9] the Kansas Court of Appeals found that "K.S.A. 44-510e(a) does not preclude an award of work disability after a claimant's loss of employment, even though due to reasons other than his or her injury."[10]

The Board acknowledges that in the past, the Kansas Court of Appeals has applied a good faith test in determining whether a termination disqualifies an injured worker from entitlement to a work disability.[11] However, the good faith requirement has recently been held to be invalid by the Kansas Supreme Court. In *Bergstrom*,[12] the court said:

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.
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> K.S.A. 44-510e(a) contains no requirement that an injured worker make a good-faith effort to seek postinjury employment to mitigate the employer's liability. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320,

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[6] *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

[7] *Niesz v. Bill's Dollar Stores*, 26 Kan. App.2d 737, 993 P.2d 1246 (1999).

[8] *Niesz* at Syl. ¶ 2.

[9] *Roskilly v. Boeing Co.*, 34 Kan. App. 2d 196, 200, 116 P.3d 38 (2005).

[10] See also *Stephen v. Phillips County*, 38 Kan. App. 2d 988, 174 P.3d 452 (2008).

[11] *See Helmstetter v. Midwest Grain Products, Inc.,* 29 Kan. App. 2d 278, 28 P.3d 398 (2001) and *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[12] *Bergstrom*, __ Kan. __, Syl. ¶¶ 1, 3, 214 P.3d 676 (2009).

944 P.2d 179 (1997), and all subsequent cases that have imposed a good-faith effort requirement on injured workers are disapproved.

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

This claim was submitted to the ALJ before the Kansas Supreme Court's *Bergstrom* decision, which abrogated the good faith requirement for work disability. However, such a result was not unanticipated. Nevertheless, the Board's analysis must change to conform to the current state of the law. The test is no longer whether claimant made a good faith effort post-injury to retain her employment with respondent and to find appropriate employment after her termination by respondent. Instead, the Supreme Court in *Bergstrom* has said that the factfinder should follow and apply the plain language of the statute. Because claimant's injuries are not covered by the schedule of injuries in K.S.A. 44-510d, her compensation is set out in K.S.A. 44-510e. It provides that once an injured worker is no longer earning 90 percent or more of her preinjury average weekly wage, then the measure of disability is the percentage of task loss averaged with the percentage of wage loss.

Respondent argues, however, that the only reason claimant is no longer working in the accommodated job it provided, and thus no longer earning 90 percent of her preinjury average weekly wage, is due to her misconduct and not due to the work-related injury. Stated another way, claimant's eligibility for a work disability, a percentage of impairment in excess of her percentage of functional impairment, is because of her misconduct, not her injury. The Board is mindful of the potential for inequitable results when applying the

literal language of the statute, but respondent's argument is for the Legislature, not the courts.

The Board affirms the ALJ's finding that claimant's injury resulted in a 15 percent permanent impairment of function to the body as a whole. This finding is supported by the testimony of Dr. Eyster, the court-ordered independent medical examiner, and also in part by the testimony of claimant's medical expert, Dr. Brown. Because claimant suffered a general body disability, her permanent partial disability is controlled by K.S.A. 44-510e.

Following her termination by respondent, claimant was unemployed and thus had a 100 percent wage loss. When she found other work, it was not at 90 percent or more of the gross AWW she was earning with respondent at the time of her injury. Therefore, her permanent partial disability is not limited to her percentage of functional impairment. Instead, it is determined by averaging her task loss and her wage loss. Claimant's task loss lies somewhere between the 17 percent opinion expressed by Dr. Eyster and the 34 percent opinions of Drs. Stein and Brown. Giving approximately equal weight to all three opinions, the Board finds claimant has lost the ability to perform 28 percent of the work tasks she had performed during the 15-year period before her accident.

Following her August 29, 2007, injury, claimant continued to work for respondent and earned 90 percent of her preinjury AWW. Her permanent partial disability is, therefore, limited to her percentage of functional impairment until March 6, 2008, when she was terminated. Thereafter:

For the period of March 7, 2008, through August 11, 2008, claimant was unemployed with a wage loss of 100 percent. Averaging this wage loss with her task loss of 28 percent computes to a work disability of 64 percent.

For the period of August 12, 2008, through November 30, 2008, claimant earned $530.76 per week which, when compared to her preinjury AWW of $1,350.82, computes to a wage loss of 61 percent. Averaging this wage loss with her task loss of 28 percent computes to a work disability of 44.5 percent.

For the period of December 1, 2008, through January 1, 2009, claimant earned $730.76 per week which, when compared to her preinjury AWW of $1,350.82, computes to a wage loss of 46 percent. Averaging this wage loss with her task loss of 28 percent computes to a work disability of 37 percent.

For the period of January 2, 2009, forward, claimant earned $955.76 per week which, when compared to her preinjury AWW of $1,350.82, computes to a wage loss of 29 percent. Averaging this wage loss with her task loss of 28 percent computes to a work disability of 28.5 percent.

CONCLUSION

(1) Claimant's termination from employment does not preclude her from receiving a work disability.

(2) Claimant has a 15 percent functional disability. From March 7, 2008, through August 11, 2008, claimant is entitled to a work disability of 64 percent. From August 12, 2008, through November 30, 2008, claimant is entitled to a work disability of 44.5 percent. From December 1, 2008, through January 1, 2009, claimant is entitled to a work disability of 37 percent. From January 2, 2009, forward, claimant is entitled to a work disability of 28.5 percent.

The Board notes that the ALJ did not award claimant's counsel a fee for his services. The record does not contain a fee agreement between claimant and her attorney. K.S.A. 44-536(b) requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the Director for approval.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated May 4, 2009, is affirmed as to the finding that claimant has a 15 percent functional disability, but is modified to find that as of March 7, 2008, she is entitled to a work disability as follows: From March 7, 2008, through August 11, 2008, claimant is entitled to a work disability of 64 percent. From August 12, 2008, through November 30, 2008, claimant is entitled to a work disability of 44.5 percent. From December 1, 2008, through January 1, 2009, claimant is entitled to a work disability of 37 percent. From January 2, 2009, forward, claimant is entitled to a work disability of 28.5 percent.

Claimant is entitled to 27.14 weeks of permanent partial disability compensation at the rate of $510 per week or $13,841.40 for a 15 percent functional disability, followed by 22.57 weeks of permanent partial disability compensation at the rate of $510 per week or $11,510.70 for a 64 percent work disability, followed by 15.86 weeks of permanent partial disability compensation at the rate of $510 per week or $8,088.60 for a 44.5 percent work disability, followed by 4.57 weeks of permanent partial disability compensation at the rate of $510 per week or $2,330.70 for a 37 percent work disability, followed by 48.14 weeks of permanent partial disability compensation at the rate of $510 per week or $24,551.40 for a 28.5 percent work disability, making a total award of $60,322.80.

As of October 6, 2009, there would be due and owing to claimant 109.86 weeks of permanent partial disability compensation at the rate of $510 per week in the sum of $56,028.60, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $4,294.20 shall be paid at the rate of $510 per week for 8.42 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of October, 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge